134-99

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1490~~. 1081

JAMES D. CRENSHAW, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 25, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1490.

JAMES D. CRENSHAW, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 4, 1889.

1 In the Court of Claims.

JAMES D. CRENSHAW
vs.
THE UNITED STATES. } No. 16322.

I.—*Petition. Filed September* 8, 1888.

To the Honorable Court of Claims:

James D. Crenshaw respectfully prefers his petition, to wit:

1. That he is a citizen of the United States and of the State of Texas.

2. That on the 10th day of June, 1881, he completed the four years' course of instruction at the United States Naval Academy, graduated therefrom as a cadet midshipman, and was thereupon formally detached from said academy and entered into active service.

3. That on the 30th day of June, 1883, after active service for two years at sea, he completed his graduation as a cadet midshipman, and from that time until June 26th, 1883, under section 1521 of the Revised Statutes, was entitled, as midshipman on waiting orders, to pay at the rate of $600.00 per annum, and from June 26th, 1883, to compensation as ensign at $800.00 per annum and rations.

4. Your petitioner respectfully represents that his said pay,
2 from the 30th day of June, 1883, to the 1st day of July, 1888, amounts to the sum of $4,733.66, of which he has been paid only the sum of $950.00, leaving the balance due and unpaid $3,763.66. Wherefore he prays judgment for said amount.

J. D. CRENSHAW.

STATE OF TEXAS,
Grayson County, } *ss:*

Personally appeared before me, a notary public in and for the State and county aforesaid, J. D. Crenshaw, who, being duly sworn, made oath that the statements made in the foregoing petition are true, and that no assignment or transfer of the claim as herein set forth, or any part thereof or any interest therein, has ever been made, to the best of his knowledge and belief.

Witness my hand and seal this 4th day of September, 1888.

[SEAL.] J. H. RANDELL,
Notary Public for Grayson County, Texas.

3 II.—*Traverse. Filed December* 31, 1888.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided,

abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Attorney General.

4 III.—*Findings of Fact and Conclusion of Law. Filed January 7, 1889.*

The court, upon the evidence, finds the facts as follows:

I.

The petitioner was appointed a cadet midshipman at the Naval Academy in September, 1877, the said appointment being as follows:

UNITED STATES OF AMERICA, *Navy Department:*

By the direction of the President of the United States you are appointed to the grade of cadet midshipman in the United States Navy from the twenty-fourth day of June, 1877.

Given under my hand and seal of the Navy Department, at the city of Washington, this — day of July, one thousand eight hundred and seventy-seven.

[SEAL.] GEO. M. ROBESON,
Secretary of the Navy.

He pursued the academic course of four years, passed a successful examination, and received a certificate from the academic board in the following words, to wit:

This certifies that Cadet Midshipman James D. Crenshaw has completed the prescribed course of study at the United States Naval Academy, and has successfully passed the required examination before the academic board preparatory to the two years' course afloat.

June 10, 1881.

II.

On the 2d day of June, 1881, he was detached from the Naval Academy by an order from the Navy Department as follows, to wit:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
WASHINGTON, *June* 22, 1881.

SIR: You are hereby detached from the Naval Academy; proceed home and regard yourself as waiting orders.

By direction of the Secretary of Navy.

Respectfully, W. D. WHITING,
Chief of Bureau.

Cadet Midshipman James D. Crenshaw, U. S. Navy.

III.

On the 25th of August, 1881, he was ordered to sea by the Navy Department, which order is as follows, to wit:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
WASHINGTON, *August* 25, 1881.

SIR: Proceed to New York and take passage in the Pacific mail steamer, which leaves on the 10th of September next, for Aspinwall, thence to Panama, and on your arrival report to Rear Admiral Balch for duty on board the United States steamer Pensacola.

Paymaster T. T. Caswell, No. 29 Broadway, New York, will secure your passage.

By direction of the Secretary.

Respectfully,

W. D. WHITING,
Chief of Bureau.

Cadet Midshipman James D. Crenshaw, U. S. Navy, Mount Washington, Ohio.

IV.

He served on the said Pensacola until the 14th day of March, 1883, when he was detached from said ship Pensacola by the following order:

U. S. F. S. PENSACOLA,
VALPARAISO, CHILI, *March* 14, 1883.

SIR: You are hereby detached from the U. S. F. S. Pensacola, and will proceed to Annapolis, Md., and report to the superintendent of the Naval Academy for examination.

On your arrival you will report by letter to the Bureau of Navigation and inform it of the date of your detachment from the U. S. F. S. Pensacola. Pay Inspector Rufus Parks, U. S. Navy, will furnish you transportation to New York.

Very respectfully, your obedient servant,

A. K. HUGHES,
Rear Admiral, U. S. Navy,
Commanding United States Naval Force, Pacific Station.

V.

He proceeded to the Naval Academy, passed successfully his final examination, and the 15th day of June, 1883, received the following certificate from the academic board, to wit:

We, the academic board of the United States Naval Academy, having thoroughly examined Naval Cadet James D. Crenshaw on all subjects, theoretical and practical, taught at this institution, and having found him proficient in each, do hereby, in conformity with the law, grant to him this certificate of graduation.

June 15, 1883.

VI.

On the 23d day of June, 1883, an order was issued detaching him from the Naval Academy, as follows:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
WASHINGTON, *June* 23, 1883.

SIR: You are hereby detached from the Naval Academy; proceed home and regard yourself waiting orders.

By direction of the Secretary of the Navy.

Respectfully, J. E. WALLER,
Chief of Bureau.

VII.

On the 26th day of June, 1883, an order was issued purporting to discharge him from service, as follows:

SIR: Having successfully completed your six years' course at the United States Naval Academy, and having been given a certificate of graduation by the academic board, but not being required to fill any vacancy in the service happening during the year preceding your graduation, you are hereby discharged from the 30th of June, 1883, with one year's sea pay, as prescribed by law for cadet midshipmen, in accordance with the provisions of the act approved August 5, 1882.

Respectfully, W. E. CHANDLER,
Secretary of the Navy.

Naval Cadet James D. Crenshaw, U. S. Navy.

6 VIII.

Since the date of that order he has not been called upon to do duty, and has not received any pay except that credited on his claim.

IX.

The certificate given at the end of the academic course at the academy, in June, 1881, to cadet midshipmen and cadet engineers was identical, with the exception that in the case of the former the certificate contained the words "preparatory to the two years' course afloat."

The claimant received one year's pay credited on his claim.

Conclusion of Law.

The court, upon the foregoing facts, decides as a conclusion of law that the petition be dismissed.

IV.—*Opinion of the Court.*

WELDON, *J.*, delivered the opinion of the court:

The claimant alleges that on the 10th of June, 1881, he completed the four years' course of instruction at the United States Naval Academy, graduated therefrom as a cadet midshipman, and entered into active service; that on the 30th of June, 1883, after two years' active service at sea, he completed his graduation as a midshipman; from that time until June 26, 1883, he was entitled as midshipman on waiting orders to pay at the rate of $600 per annum, and from the 26th of June to compensation at $800 per annum and rations.

It is then alleged for the services thus rendered, on the 1st day of July, 1888, he was entitled to the sum of $4,733.66; that he has been paid the sum of $950, leaving a balance of $3,783.66, and for that amount this suit is prosecuted.

The findings show in substance the following state of facts: The petitioner was appointed cadet midshipman in September, 1877, at the Naval Academy, pursued a course of study of four years, and received a certificate to that effect on the 10th of June, 1881.

On the 2d of June, 1881, he was detached from said academy and ordered home on waiting orders. On the 25th of August, 1881, he was ordered to sea, served on the Pensacola until the 14th day of March, 1883, when he was detached from the same and ordered to report to Annapolis for examination. He passed his final examination under said order, and on the 23d of June, 1883, an order was issued detaching him from said academy and ordering him home. On the 26th of June, 1883, an order was issued discharging him from the service, and since the date of said order he has not been required to perform any duty.

This case presents the same questions determined in the Harmon Case (23 C. Cls. R., p. 406). In that case all the questions were most elaborately discussed, both in the trial and on a motion for a rehearing, and are examined at some considerable length in the opinion.

The case of Grambs (23 C. Cls. R., p. 420) may be cited to sustain the doctrine announced in Harmon's Case.

7 *Opinion in the Harmon Case.*

WELDON, *J.*, delivered the opinion:

This case is prosecuted to recover compensation alleged to be due the claimant as a cadet midshipman and ensign from the 30th of June, 1883, to the 1st day of January, 1887. The aggregate of his compensation during that period, as he alleges, is $2,605.49. From that amount he deducts the sum of $950, leaving a balance due of $1,655.47, and for that sum he prosecutes this suit.

The petitioner entered the Naval Academy in Sept., 1877, pursued a course of study for four years, passed a successful examination, and at the end of said period received from the academic board a certificate as follows:

This certifies that Cadet Midshipman Eugene M. Harmon has completed the prescribed course of study at the United States Naval Academy, and has successfully passed the required examination before the academic board preparatory to the two years' course afloat.

June 10th, 1881.

On the 2d of June, 1881, he was detached from the Naval Academy, and on the 25th of August was ordered to sea. On the 10th of March, 1883, he was detached from the United States flagship, ordered to proceed to Annapolis, and report to the superintendent of the Naval Academy for examination. In pursuance to said order he was examined on the 15th of June, 1883, and received the following certificate:

We, the academic board of the U. S. Naval Academy, having thoroughly examined Naval Cadet Eugene M. Harmon on all the subjects, theoretical and practical, taught at this institution, and having found him proficient in each, do hereby, in conformity with the law, grant to him this certificate of graduation.

June 15, 1883.

On the 23d of said month an order was issued detaching claimant from the Naval Academy, directing him to await orders; and on the 26th of June following the Secretary of the Navy, after reciting his graduation, and there being no vacancy in the service, discharged him with one year's sea pay from the 30th of June, under the provisions of the act approved August 5th, 1882.

It is insisted on the part of the plaintiff that the act of the Secretary of the Navy discharging him on the 26th of June was unauthorized by the act of the 5th of August, 1882, the plaintiff not being an under-graduate within the meaning of said act and said act not applying to the class of 1881 and 1882. In support of this theory of the law our attention is called to the cases of Leopold *v.* United States, 18 C. Cls., 546; Redgrave *v.* same, 116 U. S., 474; Perkins *v.* same, 116 U. S., 483.

It is also insisted that at the time of the passage of said act the claimant, by virtue of his course at the academy and graduation, under the existing law, had vested rights which could not be affected by the repeal of a statute under which they were acquired; and there can be no repeal by implication. As a defense to the claim, it is urged by the attorney for the Government that said statute, fully authorized the Secretary to make the order of the 26th of June, and that the claimant had no rights at the time of its passage which was [were] not subject to the jurisdiction and control of Congress. As this case is presented, it is material for us to determine at what
8 period the claimant completed his course as a cadet midshipman, because upon that determination depends the question whether the issue is disposed of by the reasoning in the adjudications of this and the Supreme Court. In the cases cited the question was not that of a cadet midshipman, but a cadet engineer. It was held in the Leopold case by this Court that a cadet engineer graduated at the Military Academy in four years; that the two years at sea are not years of study, but of service; and the subsequent case

of Redgrave, which was affirmed by the Supreme Court, adopted that theory of the law in the construction of the act of August 5, 1882.

Cadet engineers are not under-graduates when they are performing the service incident to the two years following their study at the academy, but are then in the discharge of the duties incident to a period between graduation and promotion. They are to be examined at the end of six years, which included their four years at the academy and two years on the sea, in order to determine the question of promotion. The right of a midshipman as affected by the act of Aug. 5, 1882, and the incident act of the Secretary of the Navy under said act is an original question in this court, being unaffected by the former decisions, except in so far as by analogy they become authority as judicial reason. The statute enacts in the second proviso—

But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year 1882.

Involved in this proviso are two distinct thoughts, which in our judgment become important in the construction of the act as affecting the issue in this proceeding. First, the statute does not apply to "the class of 1882;" and, second, as composing that class, all graduates "who may so far complete the six years' course" during said year. An exception was made in favor of the class of 1882, but there the exception stopped, leaving all subsequent classes subject to the provisions of the statute. This and the Supreme Court have decided that the statute was prospective only, and did not apply to any class except those graduating subsequent to its enactment. So that, both by the provisions of the law and the decision of the Supreme Court, there is eliminated from the present discussion the question as to retroactive legislation. "Who may complete the six years' course." This phraseology clearly contemplates a condition incident to a class of students in the Naval Academy impressed upon them by legislation and usage anterior to the act of the 5th of August, 1882.

It will be seen by reference to finding I that the certificate given to the midshipman at the end of four years spent in the academy differs in its terms from the certificate issued to the cadet engineer in the words "preparatory to the two years' course afloat." At the end of two years' course afloat, the cadet midshipman is required to return to the academy, subject himself again to some extent to the jurisdiction of the institution, in order that an academic board may determine whether his acquirement afloat is sufficient, in connection with his scholarship at the institution, to justify his certificate of graduation. His education is theoretical and practical; the one he acquires in the immediate institution, the other on the high seas; but each acquirement comes within a course of study covered by a period of six years. Before the claimant became a student at the academy

Congress had legislated upon the subject of his academic
9 course, and his rights in the institution became and were im-

pressed with all the consequences of that legislation. Sect. 1520, R. S., provides—

The academic course of cadet midshipmen shall be six years.

This law was in force when the act of 1882 was passed, and is unrepealed by it. In speaking of last-named act, Mr. Justice Mathews, in the Redgrave case, said:

The general purpose of this act is apparent. One main object was to abolish the distinction previously made by law between cadet engineers and cadet midshipmen, and for the future to merge both classes in the new designation of naval cadet. The previous differences between them grew out of the separate provisions as to their number, their manner of appointment, their course and term of study, and their pay after four years' course of study at the academy.

And after further discussion of the difference the learned justice concludes:

This leaves the state and condition of cadet engineers, who at the date of the passage of the act were already graduates according to the law as it then stood, unchanged, and to this class the appellee belonged.

The purpose of the act of 1882 was to abolish the distinction in name between cadet engineers and midshipmen, and to provide for the two, but one classification, known to the law at present as "naval cadets." One of the differences between them, according to the Supreme Court, is a difference of "course and term of study." That difference of term of study is a difference of four and six years, and by the decision of this and the Supreme Court it is adjudicated that the term of service of a cadet engineer is but four years. The term of service of the claimant having commenced in 1877, his course of study being six years, did not terminate until June, 1883, and if so, he was an under-graduate of the class of 1883, and so became subjected to the provisions of the statute of 1882. Having determined that the provisions of the statute are applicable by intendment of Congress to the claimant, it remains for us to notice the other point of contention, made by the very able argument of counsel for the claimant, that upon the completion of the prescribed curriculum he had a vested right to be commissioned a midshipman. Vested rights incident to a claim are, in legal contemplation, as sacred against the encroachment of the Government as are any rights of private property; but those rights must originate and exist consistent with the just and constitutional powers of the Government to regulate its public policy without being responsible to individuals in damages. (Deming *vs.* United States, C. Cls., 1, 190.)

The number of men in the army and navy is dependent entirely on the will of Congress, and in the legislation incident to that question the highest rights of sovereignty are exercised by the Government. The cases cited in the brief of counsel are the extreme cases on the subject of vested rights; and, while they are well considered and ably stated and of binding authority in this court, they do not go to the extent of protecting the claimant in the enjoyment of a vested right because of his graduation at the Naval Academy.

Section 1521, Revised Statutes, provides—

When cadet midshipmen have passed successfully the graduating examination at the academy they shall receive appointments as midshipmen, and shall take rank according to their proficiency as shown by the order of their merit at the date of graduation.

This is the section of the law which provides for the permanent employment of the students of the Naval Academy. Can there be deduced from this statute an obligation upon the part of the Government to so continue its policy in reference to the navy as that the claimant's service as a midshipman would be necessary, and therefore his appointment as such be made by the President by and with the advice and consent of the Senate?

In the Fisher case this Court has decided—

With some few exceptions Congress may at any time reduce the salaries of public officers. The only contract which arises from a statute establishing a salary is to pay the incumbent that salary while that law remains in force. (15 C. Cls., 323.)

The Fisher case was taken to the Supreme Court, and, upon appeal, the principle announced in this Court was affirmed, the Supreme Court saying:

Congress therefore could, without the violation of any contract, reduce the salary of the appellee, and had the constitutional power to do so.

It will be seen by reference to the 12th finding that the obligation assumed by the cadet, on his admission to the academy, is in consonance with the view of the law herein stated. The obligation on his part was to serve eight years, "unless sooner discharged by competent authority." The discharge in this case was in strict pursuance of law, by an executive officer of the Government authorized by the statute to perform that function. Obligations are not always mutual in the liability of the parties to perform. They are often unilateral, giving a right to one to declare the obligation at an end, while the other party is bound to a full performance. The policy of the statute under which the claimant was discharged is a question which cannot be approached by the judiciary. It remains for Congress to determine questions of that character; and, having determined it as we have stated, it is the judgment of the Court that the petition be dismissed.

Opinion in the Gramb's Case.

RICHARDSON, *Ch. J.*, delivered the opinion of the Court:

* * * * * * *

Thus, in any view of the case which we can take, the Secretary of the Navy was required by law to give to the claimant a certificate of appointment and an assignment to one of the various corps in which vacancies existed upon the recommendation of the academic board.

The Secretary gave him a certificate of discharge in lieu of one of appointment under an interpretation of the statute which this Court and the Supreme Court subsequently decided to be erroneous.

The question then arises, How did this leave the claimant? It is contended that, as the certificate of discharge was unwarranted, he remained in the office of naval cadet and still continues to hold that office. He claims the emoluments of a naval cadet since the expiration of the time to which he was paid by the one year's sea pay in advance, received with his certificate of discharge, or the pay of the office to which he was entitled by law to have been appointed.

We cannot concur in these views. In our opinion, the term of office of naval cadets, as did that of cadet midshipmen, expires with the completion of six years' course, when, if not appointed to another and different office, they *ipso facto* cease to be officers in the navy.

The Revised Statutes provide as follows:

SECTION 1512. The students at the Naval Academy shall be styled cadet midshipmen.

SEC. 1513. There shall be allowed at said academy one cadet midshipman for every member or delegate of the House of Representatives, one for the District of Columbia, and ten appointed annually at large.

SEC. 1520. The academic course of midshipman shall be six years.

SEC. 1521. When cadet midshipmen shall have passed successfully the graduating examination at the academy, they shall receive appointments as midshipmen and shall take rank according to their proficiency as shown by the order of their merit at the date of graduation.

11 There are no provisions in the statutes for cadet midshipmen or naval cadets, as now called by the act of August 5, 1882, beyond the term of their course at the academy. If at their final graduation they receive appointments to other and different offices as provided by law, they remain in the navy, not as naval cadets, but as officers of the grade of the line to which they are thus appointed. If not promoted they go out of office because their academic course has ended, and the office of cadet midshipman or naval cadet has expired. A new class has taken their place at the academy, and the previously existing vacancies in the grades of offices — which they were eligible have been filled.

The act of July 16, 1870, Ch. 295, sec. 11 (16 Stat. L., 334), made students at the Naval Academy cadet midshipmen, but did not include them among the grades of the line officers of the navy.

The lowest of these officers remained midshipmen, and so continued (Rev. Stat., 1362) until changed to ensign by the act of March 3, 1883, Ch. 91 (22 Stat. L., 472), and act of June 26, 1884 (23 Stat. L., 60).

There can be no doubt that Congress may directly or indirectly limit the tenure of offices created by law in all cases where the Constitution does not establish it.

Thus it seems clear that the claimant went out of office by the expiration of the tenure limited by the course of legislation. He cannot, therefore, receive pay as a naval cadet, nor can he have the pay of any other office to which he might and ought by law to have been appointed, for the reason that he does not hold and never has

held any other office in the navy. We have no means of ascertaining what other office he would have been appointed to had the Secretary of the Navy followed the law. He might have been made an ensign in the line, an assistant engineer, or an officer in the Marine Corps, according to assignment intrusted to the discretion of the Secretary, as provided by the act of August 5, 1882, and the salaries of those officers are not all alike. A similar point arose in Benjamin's case (10 C. Cls. R., 475). The court there held that if a midshipman, then an under-graduate at the Naval Academy, were entitled to be commissioned ensign, and the President should refuse to issue his commission, no action would lie for the salary of the office which he did not possess.

Whether or not the claimant, had he moved in due season, might not have maintained a mandamus to compel the Secretary of the Navy to give him the certificate of appointment to which he was entitled is not in issue here, and we should have no jurisdiction of the question if it were presented.

Instead of pursuing that remedy, or any other until this action was commenced, July 17, 1886, the claimant accepted the one year's sea pay, as provided by law for cadet midshipmen, allowed by the act of 1882 to naval cadets to whom certificates of discharge were given, and to that extent acquiesced in his discharge. (Hildebrand's case, 13 C. Cls. R., 62; Duryea's case, 17 C. Cls. R., 24.)

Whether he be estopped by his own laches and acquiescence or not it is clear to us that he cannot recover in this Court the salary of an office which he does not hold.

The status of cadet midshipmen or naval cadets after completion of their academic course must not be confounded with that of cadet engineers who graduated at the academy in 1881 and 1882. We have held in the Leopold, Redgreave, and Perkins cases, as before stated, that those officers were not made naval cadets by the act of August 5, 1882, and so were not subject to discharge by the Secretary of the Navy under the provisions of that act.

Cadet engineers, after graduation at the Naval Academy, performed service at sea with increased pay. They were styled "cadet engineers, graduates," on the Naval Register, and were so appropriated for in annual appropriation acts.

They were not required to pass any competitive examination, because they had no claim, as of right, to promotion or appointment to other offices as did cadet midshipmen.

Section 1403 of the Revised Statutes provides that—

Cadet engineers who are graduated with credit in the scientific and mechanical class of the Naval Academy may, upon the recommendation of the academic board, be immediately appointed as assistant naval constructors.

Section 1394 provides that—

Cadet engineers who are graduated with credit in the scientific and mechanical class of the Naval Academy may, upon the recommendation of the academic board, be appointed by the President and confirmed by the Senate as second assistant engineers.

12 The President was not required to make such appointments,

nor was a time fixed at which he should determine whether or not he would appoint any of them. The only provision for their discharge is found in section 1525 of the Revised Statutes, where it is enacted that—

Cadet engineers shall be examined from time to time, according to regulations provided by the Secretary of the Navy, and if found deficient at any examination, or if dismissed for misconduct, they shall not be continued in the academy or in the service, except upon the recommendation of the academic board.

If not found deficient at any examination nor dismissed for misconduct, they continued in service as cadet engineers until the President saw fit to appoint them to other and higher offices.

Not so with cadet midshipmen, who, as such, disappeared from the Naval Register and from the service immediately upon their graduating examination.

The claimant's petition is dismissed.

V.—*Judgment of the Court.*

JAMES D. CRENSHAW
v.
THE UNITED STATES. } 16322.

At a Court of Claims held in the city of Washington on the 7th day — January, A. D. 1889, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, James D. Crenshaw, be dismissed.

BY THE COURT.

13 VI.—*Application of Claimant for and Allowance of Appeal.*

JAMES D. CRENSHAW
v.
THE UNITED STATES. } 16322.

From the judgment rendered in the above-entitled cause, on the *the* 7th day of January, 1889, in favor of the defendants the claimant, by his attorneys, on the 22d day of January, 1889, makes application for and gives notice of an appeal to the Supreme Court of the United States.

H. O. AND R. CLAUGHTON,
Att'ys for Claimant.

Filed January 22, 1889.

Allowed in open court January 22, 1889.

WILLIAM A. RICHARDSON,
Chief Justice.

14 In the Court of Claims.

JAMES D. CRENSHAW
vs.
THE UNITED STATES. } 16322.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court and conclusions of law thereon, of the opinion of the Court, of the judgment of the Court dismissing the petition, of the application for and the allowance of an appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 24th day of January, A. D. 1889.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 1490. James D. Crenshaw, appellant, *vs.* The United States. Filed January 25, 1889.

Office Supreme Court U. S.
FILED.
DEC 23 1889
JAMES. H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM 1889.

JAMES D. CRENSHAW,
vs.
THE UNITED STATES. } No. 1,081.

BRIEF OF APPELLANT'S COUNSEL.

In the Supreme Court of the United States.

OCTOBER TERM 1889.

JAMES D. CRENSHAW,
vs.
THE UNITED STATES. } No. 1,081.

BRIEF OF APPELLANT'S COUNSEL.

This is an action brought by the Appellant, to recover pay alleged to be due to him as a Midshipman in the United States Navy.

The Court of Claims dismissed his petition as being within the ruling of the court in the case of Eugene Harmon vs. The United States.

The case of Eugene Harmon was heard twice by the Court of Claims. At the first hearing, the petition was dismissed upon the ground that a Cadet Midshipman was not an officer, and at the last hearing the court held that though an officer until his graduation, he ceased to be an officer at that time.

It is not necessary to discuss the ground upon which the Harmon case was dismissed at the rehearing, to wit, that the Appellant ceased to be an officer in the Navy, *ipso facto* upon his final graduation. The contention in this particular is that Congress had no right to make the Appellant a Naval Cadet, and the answer of the Court of Claims is conceding that he remained a Midshipman until his final

He shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambasadors * * * * * *and all other officers of the United States* whose appointments are not herein provided for, and which shall be established by law. But Congress may by law vest the appointment of such inferior officers as they think proper in the President alone * * * *

By Section 8, paragraph 13 of Article 1 of the Constitution of the United States, it is declared that Congress shall have the power to provide and maintain a Navy, and by the 14th paragraph of the same Section, it is declared that Congress shall have the power to make rules for the government and regulation of the land and naval forces.

Congress very early in the history of the Government authorized the President to appoint Midshipmen as officers of the Naval Service, (Vol. 1, Statutes at Large, p. 350), and the law as it stood at the time of the Appellant's appointment as Midshipmen in the Navy, was as follows:

1. Sec. 1511 of the Revised Statutes of the United States. "The Naval Acanemy shall be established at Annapolis in the State of Maryland."

2. Sec. 1513. "There shall be allowed at said Academy, one Cadet Midshipman for every Member or Delegate of the House of Representatives."

3. Sec. 1520. "The Academic course of Cadet Midshipmen shall be six years."

4. Sec. 1521. "When a Cadet Midshipman shall have passed successfully the graduating examination at the Academy, they shall receive appointments as Midshipmen, and shall take rank according to their proficiency as shown by the order of their merit at the date of graduation."

5. A regulation which required the appointee to enter into a bond, binding him to serve as an officer for the

period of eight years, unless sooner discharged by competent authority.

6. Sec. 1556. Midshipmen *after graduation*, shall be entitled to receive annual pay, when at sea, one thousand dollars, on shore duty, eight hundred dollars, on leave or waiting orders, six hundred dollars. Cadet Midshipmen, five hundred dollars: during such period of their course of instruction as they shall be at sea in other than practice ships, shall receive an annual pay not exceeding nine hundred and fifty dollars.

7 and 8. Sec. 1229 and Art. 36 of Sec. 1624 of the Revised Statutes. No officer in the Military or Naval Service, shall in time of peace be dismissed from service, except upon, and in pursuance of the sentence of a Court-martial to that effect, or in commutation thereof.

This constitutes all of the law as it existed at the time of the Appellant's appointment, necessary to be considered in ~~this~~ the discussion of this case.

Five years after his appointment, more than one year after his first or Academic graduation, and after he had been detached from the Naval Academy, and ordered to do duty as an officer at sea, and when he was doing such duty as a Midshipman, Congress passed an Act approved August 5, 1882, being the annual Naval Appropriation bill with the interpolation, as follows: "*Provided*, that hereafter there shall be no appointments of Cadet Midshipmen or Cadet Engineers at the Naval Academy, but in lieu thereof Naval Cadets shall be appointed from each Congressional district and at large, as now provided for Cadet Midshipmen, and all the *undergraduates* at the Naval Academy, shall *hereafter* be designated and called "Naval Cadets," and from those who successfully complete the six years course, appointments shall *hereafter* be made as is necessary to fill vacancies in the lower grades of the line, and Engineer

Corps of the Navy and the Marine Corps; and provided further that no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year." "And if there be a surplus of graduates, those who do not receive such appointment, shall be given a certificate of graduation, and honorable discharge, and one year's sea pay, *as now provided by law for Cadet Midshipmen*, and so much of Section 1521 of the Revised Statutes as is inconsistent herewith is hereby repealed."

"Any *Cadet* whose position in his class, entitles him to be retained in the service may, upon his own application, be honorably discharged, at the end of *four years course at the Naval Academy*, with a proper certificate of graduation."

The foregoing being the state of the law, at the time of the Appellant's appointment as a Midshipman, and at the time of his final graduation in June, 1883, the then Secretary of the Navy professing to act by authority of the Act approved August 5, 1882, on the 26th day of June, 1883, notified the Appellant, that, in accordance with the provisions of said Act, he was thereby discharged, from the 30th day of June, 1883.

If this pretended discharge was the act of competent authority, the judgment of the Court of Claims should be affirmed, if it was not, this court must reverse that judgment.

We submit that the Appellant has not been discharged by competent authority, because, neither Congress nor the Secretary of the Navy, nor any department of the Government is competent, in time of peace to discharge an officer from the Naval Service.

It is immaterial, what motives influenced Congress to make it a part of the law of the land, that every Naval and Military officer, should hold his office during good be-

havior, (that is for life), nay more—for that was from the foundation of the Government the unwritten and well understood law—but that the fact that his misconduct justified his discharge should be ascertained by a judicial tribunal, it is now the law which protects every officer from the arbitrary oppression of any department of the Government, except under the conditions and circumstances within the decision of the Blake case, which conditions and circumstances are altogether wanting in this case; and it may be, that under the changes in the law since the discharge of Blake, the court would not deem the decision in that case applicable to the law as it now exists. The interpretation of the Act of July, 1866, was controlled by Acts *in pari meteria*, but Congress in 1874 re-enacted this provision as it appears in Section 1229 of the Revised Statutes, unaccompanied by the provisions of the law in force in 1870, when the President by and with the advice of the Senate, appointed Gilmore, chaplain in place of Blake. Thus more than ten years after the condition of affairs which was the key to the interpretation given to the law in the Blake case had ceased to exist, Congress re-enacted Section 1219, and adopted Art. 36 of Section 1624, and these now stand independent and explicit and uncontrolled by any other provisions of the law. A brief view of the legislation which resulted in the adoption of Section 1229 and Art. 37 of Section 1624 of the Revised Statutes, will aid us in the interpretation of the law.

Prior to the Act of July 13, 1866, the President had the power to *dismiss at his will* any officer in the Military or Naval Service. Section 17 of that Act declares that no officer in such service in time of peace should be dismissed, except upon the sentence of a Court-martial. Section 17 of the Act approved July 15, 1870, (16 Statutes at Large, p. 319), authorized the President to drop from the rolls of

the *Army* for desertion, any officer, who was absent from duty more than three months without leave, and in 1874, these two provisions were re-enacted as they appear in Section 1229 of the Revised Statutes, arranged under the head of Title 14—The Army, as follows: "The President is authorized to drop from the rolls of the *Army*, for desertion any officer who may be absent from duty three months without leave, and no officer so dropped shall be eligible to reappointment. And no officer in the Military or Naval Service shall in time of peace be dismissed from service, except upon, and in pursuance of the sentence of a Court-martial to that effect or in commutation thereof.

At the same time Congress adopted under Title 15—The Navy, *the law*, reported by the revisors found in Art. 36 of Section 1624 of the Revised Statutes, as follows: "No officer shall be dismissed from the *Naval* Service, except by the President or by a sentence of a general Court-martial *and in time of peace* no officer shall be dismissed, except in pursuance of a general Court-martial or in mitigation thereof.

We find then, that Congress has emphasized the declaration of its will, that in time of peace no officer in the Military or Naval Service, shall be dismissed therefrom, except upon the sentence of a Court-martial to that effect, by ingrafting it in the regulations provided for both branches of the service. Congress was in earnest upon this point. In time of war, the President after the passage of the Act of July, 1866, had the power as provided by the Act of 1870, to dismiss an officer from the *Military Service* for desertion in advance of the sentence of a Court-martial, and perhaps from the Naval Service for any cause deemed sufficient by him, but before July, 1866, to wit, by the Act of March, 1865, (13 Statutes at Large, p. 429), it was provided that an officer dismissed by the President should have the right

to demand a trial by a Court-martial, and if the trial was refused, or if granted, and the sentence of the Court-martial was neither dismissal nor death, the order of dismissal by the President should be void, and the officer by operation of the law was restored to the service. Again Congress in adopting the Revised Statutes, has repeated its sovereign will in this particular, as found first in Section 1230 of the Revised Statutes in relation to Army officers, and in Article 37 of Section 1624 in relation to Naval officers.

So that as the law stood at the time of the Appellant's appointment, the appointment was during good behavior, that is for life, and if dismissed during the war by the President, before trial by a Court-martial, the right to such trial was guaranteed to him after dismissal, and in time of peace, the sentence by the Court-martial had to ~~proceed~~ precede the dismissal by the President.

This is all very plain. During war the exigency might require immediate action by the Commander-in-Chief, but even then, this sort of Jedwood jury practice of condemning a man first and trying him afterwards, was provided, as a constitutional protection thrown around the life tenure of the officer of which he could not be deprived, except for misbehavior ascertained and adjudged by a tribunal of his peers.

Prior to these enactments, this court had decided that the President had the power to dismiss an officer from the service, that power being incident to the power of appointment.

The court in the case *ex parte* Hennen 13 Peters, approved of the resolution of Congress, passed after the wonderful debate of 1794, when by a very small majority, that learned body passing upon this as a political question, resolved that the right to remove was incident to the power to appoint. The action of the Senate, was doubtless owing

in a great measure to the unanswerable logic and great influence of Mr. Madison, who, while he maintained that the President had the *power*, declared that the arbitrary and unjust exercise of that power, would subject him to impeachment. Congress by these Acts, throws around the Naval and Military Officers of the United States, the protection of a judicial tribunal, composed of their peers.

Now, no department of this Government in time of peace, has authority to dismiss an officer in the Navy or Army from the service, except upon, and in persuance of the sentence of a Court-martial to that effect, and therefore neither the Act of Congress, approved August 5, 1882, nor the Act of the Secretary of the Navy, was the act of competent authority, not having been upon, and in pursuance of a Court-martial to that effect, and he is therefore still a Midshipman in the Navy and *entitled to his pay as such* officer.

Second. But neither Congress nor the Secretary of the Navy, before the Act of 1866, (Sec. 1229) had the power to dismiss a Midshipman from the service. The President had the power under the limitations announced by Senator Madison, and the President alone, and without the assent of the Senate. When Congress authorizes the head of a department, as under the Constitution, it has the power to do, to appoint an officer, in the absence of express prohibition, such department would have the right to remove. But now the express, makes the implied to cease.

Let us interpret this Act of August 5, 1882, in the light of the law as it stood independent of Section 1229 and Art. 36 of Section 1624. Does the Act of August 5, apply to Cadet Midshipmen, at all? Is it not entirely prospective? Did it make those who had been appointed Cadet Midshipmen, Naval Cadets? Could it? Congress

has no power to appoint an officer. It had authorized the President to appoint Cadet Midshipmen, and he had done so, was it in the power of Congress to undo his appointment? (Marbury vs. Madison, 1 Cranch). There are some provisions in that Act which are obnoxious to the criticism that they indicate an intention to embrace Cadet Midshipmen, but there are others which are inconsistent with this interpretation. The law if intended to be prospective, was a wise law. If intended to be retrospective it was unjust and therefore unwise.

Prior to the enactment there had been two classes of appointments to the Naval Academy, Cadet Midshipmen, appointed by the President, and Cadet Engineers, appointed by the Secretary of the Navy.

By the statutory contract with Cadet Midshipmen, they were *entitled* to promotion. Cadet Engineers, were only *eligible* to the appointment of Assistant Engineers. There was no limit to the number of Midshipmen, and under the law as it then stood there might be a superfluity of Midshipmen, which would become an encumbrance upon the Navy. It was wise legislation to provide a remedy for this mischief, and this Act was passed for that purpose. Hereafter there shall be no appointment of Cadet Midshipmen or Cadet Engineers, but Naval Cadets shall be *hereafter* appointed in respect to whom there was no undertaking that they should be promoted upon passing a satisfactory final examination. Now, some of the undergraduates at the Naval Academy are Cadet Midshipmen and others Cadet Engineers, hereafter all the undergraduates at the Naval Academy, shall be designated and called *Naval Cadets*, not as now, some Cadet Midshipmen and others Cadet Engineers. *Naval Cadets*, to a limited extent, shall upon graduation be promoted indiscriminately to the line, the Engineer and the Marine Corps, not as now specifically all graduated Cadet Midshipmen in the line

of the Navy, and all graduated Cadet Engineers become eligible to promotion to the staff. This interpretation of the Statute makes it consistent with itself and with the purpose of its enactment.

We remark first, that the Act, so far as it was designed to reduce the number of officers in the Navy, applied only to Naval Cadets. Our first inquiry then is, did the Appellant become a Naval Cadet under this Act? This court in construing a similar Statute held that the Act of July 5, 1870, (16 U. S. Statutes 334), which declared that the *students* at the Naval Academy shall hereafter be styled Cadet Midshipmen, was prospective and did not apply to the students who had been appointed Midshipmen. (The United States vs. Baker, 125 U. S. Reports 646). The language of the Act of July 5, 1870, was broader than that of August 5, 1883, the former referring to *students*, and the latter to *undergraduates*, and the right of all who graduated to promotion was not affected by the former.

We respectfully submit, that it is constitutional that the President alone, has the power to appoint Midshipmen. Congress under the power with which it is clothed by the Constitution authorized the *President alone* to appoint Midshipmen. Congress has never authorized any branch of the Executive Department of the Government to appoint Naval Cadets, unless the power is found in the Act approved, August 5, 1882. All appointments made to the Naval Academy subsequent to August 5, 1882, were designated in their appointments as Naval Cadets. But the President appointed them. Congress could not. But how could Congress make an officer, who was appointed a Midshipman by the President, and who could not have been appointed by any other person, a Naval Cadet? If Congress has no power to appoint a Naval Cadet, how can it change a Midshipman into a Naval Cadet.

Would not that be *indirectly* appointing an officer of the United States, although it is written in the Constitution, that the President shall by and with the advice of the Senate appoint *all officers of the United States* whose appointments are not otherwise provided for by the Constitution, but that Congress may *by law* vest the appointment of such inferior officers as they think proper in the President alone, or some branch of the Executive Department.

Congress had vested the appointment of Cadet Midshipman in the President alone, and he had made the appointments under the law and the Constitution. The President himself could not unmake them or change them into any other than he had made them in the act of appointment. How can Congress who has no constitutional power to appoint or in any manner change or qualify an Executive appointment—change a Cadet Midshipman into a Naval Cadet? Under the Constitution, Congress creates the office—but the Executive makes the officer. Is not the Act of August 5, 1882—if it meant to do, what is claimed for it by the United States an insidious attempt to usurp Executive functions, notwithstanding all Executive power, is by the Constitution vested in the President?

But this is not the only vice of this Act. It not only attempts to undo what the President had done by changing the name of the appointee, but also the nature and character of the appointment, so that it ceases altogether to be what the Executive had made it. Every Cadet Midshipman who passed satisfactorily the final Academic examination, became entitled to promotion as an officer in the line. But only so many Naval Cadets, were to be promoted as there were vacancies to be filled, and even then, not to the line exclusively, but either to the line, the staff, or the Marine Corps, as the *Secretary of the*

Navy might please. Surely no more need be said upon this point.

But suppose Congress did intend the Act to change all the *undergraduates* at the Naval Academy, into Naval Cadets, and had the power to make such change, then the next inquiry is, who were *undergraduates* at the Naval Academy? An undergraduate is a student at a university or college, who has not taken a degree. The students at the Naval Academy, have two graduations, one strictly Academical, the other Theoretical and Academical. At the end of four years, if they passed successfully their examinations, they graduate and receive a certificate of graduation, are by order of the Secretary of the Navy, detached from the Naval Academy, and sent home to await orders for duty, are then ordered to proceed to some ship and report for duty as officers in the actual service. Now, can the Appellant, who had passed his first graduation, had been detached from the Academy, ordered to sea, and was actually doing duty as an officer in the active service at the time the Act was passed, be considered as *an undergradnate at the Naval Academy*, when he was neither an undergraduate nor at the Naval Academy? The construction given to the Statute of 1870 by the authorities at the Naval Academy has been that Midshipmen were graduates, at the end of the four years course. (15 Opinions of Attorney General 537, 16 Id. 29). The Navy Department so considers them, and they are styled in the Navy Register as the classes of that year, and their sea service dates from that graduation.

The regulations of 1851, used the word graduate as applying to the successful examination at the end of the four years course, and ever since graduation has been used in that sense at the Naval Academy.

The regulations subsequent to 1851 restore sea service after graduation as a part of the Academic course, and Congress recognizes sea service after that graduation as part of the Academic course. (16 Statutes at Large, p. 390).

The Act of March 3, 1873, passed with the knowledge that the regulations of the Department had added two years of sea service after graduation to the four years course, recognized this, and put it in the form of a law by providing that the Academic course should be six years.

It is quite apparent then, that although the student was not a full graduate at the end of his *preparatory course* of four years, that when he had successfully completed that course, and had been detached from the Academy, he could not be in any sense considered an *undergraduate at the Naval Academy*. Ever since 1874, the Academic course of Cadet Midshipmen and Cadet Engineers has been the same, four years of study at the Academy, and two years of service at sea. It appears that the practice has not pursued the law in the case of Cadet Engineers. Although the law requires them to return to the Academy at the end of six years for examination, it has been the custom for them to pass this final examination before a special board. But the law prescribes that their course of instruction shall be six years, recognizes two graduations, fixes their pay *before final* Academic graduation at $500, and after final *Academic* graduation at $1,000. (Sec. 1556, Revised Statutes).

That their final examination was to be before the Academic board, also appears from the provision of the law, that they are *eligible* to the appointment of Second Assistent Engineers, only upon the recommendation of the *Academic board*. (Sec. 1394, Revised Statutes).

It was afterwards provided that though *eligible* to such

appointment upon the recommendation of the Academic board, they should not receive the appointment until after an examination before a special board.

It is quite apparent that the Act of August 5, 1882, was prospective, and although there are some expressions in the Act liable to a different construction, this may be explained by the fact, that this Section was the production of a conference committee hurriedly attached to the Naval Appropriation bill, in the closing hours of Congress.

Having seen that this law cannot be construed to be retroactive unless the intention of Congress to make it so, is conclusively impressed upon the Act, we now approach the further question involved in this controversy.

If this Act was intended to be retroactive and to apply to the classes of 1881 and 1882, then we maintain that it was unconstutional null and void.

The relations existing between the Appellant and the United States was contractural. Congress in the exercise of its constitutional power to provide and maintain a Navy, enacted laws which were in full force and operation when the Appellant contracted with the Government to accept the appointment of Cadet Midshipman, and enter into an obligation to pursue the course of study prescribed in the Act, and to serve in the Navy for the period of eight years unless sooner discharged by competent authority. By one of these Acts there was an engagement upon the part of the Government that if the Appellant faithfully and successfully performed the contract on his part that he should be promoted, and by the others that he should hold his office during life unless dismissed from the service upon and in pursuance of the sentence of a Court-martial to that effect. These Acts were just as much parts of the contract, as if one had been formerly drawn up, into which they had been

incorporated as parts thereof. Under this contract, the Appellant bound himself to submit to the discipline of the Navy, to pursue the precribed curriculum, to serve in the Navy for the period of eight years, and if he had violated his contract he would have been guilty of desertion, and exposed to all the penalties and degredation attached to that crime.

He fully performed the contract on his part, and Congress has no power to release the Government from the obligation to perform the contract on its part.

In the first place, the Government said to the Appellant, if you accept the appointment of Cadet Midshipman, and comply with your engagements in respect to that appointment, and obey the laws, you shall become an officer in the Naval Service for life, unless dismissed for misconduct in time of peace in pursuance of the sentence of a Court-martial, or in time of war by the Commander-in-Chief of the Navy.

The Appellant accepted this proposition, and did all that the law and his contract required him to do. From the time of his appointment as Midshipman, and acceptance of the same he acquired vested rights, which were sacred, and of which he could only be deprived by misconduct on his part, ascertained and adjudged by a judicial tribunal designated in the Act.

From the foundation of the Government, up to the passage of the Act of 1866, the President had the power to dismiss an officer from the Naval Service, and this power was incidental to his power to appoint. From the foundation of the Government, it was understood that the officers of the Army and the Navy, were appointed during good behavior, that is for life, but prior to the Act of 1866, the President was the judge of the question of misbehavior, except in so far as his jurisdiction was qualified

by the Act of March, 1865. Senator Madison in the great debate of 1794, to which we have already referred, while maintaining that this power was in the President, declared that the despotic exercise of the power would be an outrage, for which he could be impeached. This Act protects the officer from this outrage, and secures to him the right of a trial by his peers.

We repeat, that the effect of these Acts is to make such officers, officers for life. The only difference between them and the judges of this court is, that the life tenure of the judges is guaranteed by the Constitution, while that of these officers is guaranteed by the Act of Congress. Congress cannot pass a *prospective* Act as to the judges, Congress can pass a prospective Act as to these officers, but Congress as to *them* cannot pass an Act which would divest those theretofore officers, of their vested rights. It is conceded that there are officers whose appointments are gratuities, and that as to them there is neither contract, *tenure* nor binding obligation to continue the salary first paid to them. As to such, Congress may abolish the office, remove the officer or change the salary. But when the office is for life, or for a fixed term, according to the law as it existed when the appointment was made, Congress has no power to deprive the appointee of his rights under the appointment.

That such an officer has vested rights in his office, which the courts are bound to protect was decided by this court as early as the year 1803, in unmistakable terms. This is what the court then declared, "The power of nominating and of appointing are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. *If by law* the officer be removable at the will

of the President, then a new appointment may be immediately made, and the rights of the officer are terminated."

"But as a fact, which has existed, cannot be made never to have existed, the appointment cannot be annihilated, *and consequently if the officer is by law not removable at the will of the President the rights he has acquired* are protected by the law *and are not resumable by the President.* They cannot *be extinguished by Executive authority,* and he has the privilege of asserting them in like manner as if they had been derived from any other source."

"The question as to whether a right has vested or not is in its nature judicial, and must be tried by judicial authority." (Marbury vs. Madison, 1 Cranch 167).

"The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right. If this obloquy is to be cast upon the jurisprudence of our country, it must arise from the peculiar character of the case."

"It behooves us then to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress."

"In pursuing this inquiry, the first question which presents itself, is whether this can be arranged with that class of cases which come under the description of *damnum absque injuria,* a loss without an injury. This discription of cases never has been considered, and it is believed never can be considered as *comprehending offices of trust, of honor, or of profit.*" (Id. p. 163 et seq).

"When an officer is removable at the will of the President, the circumstance which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested if still in the office.

But when the officer is not removable at the will of the Executive, the appointment is not revocable and *cannot be annulled. It has conferred legal rights which cannot be resumed.*" (Id. p. 162).

These quotations are conclusive upon the point that when an officer is appointed, who is not removable at will, he acquires vested rights, of which he cannot be deprived.

We, have then, an officer appointed for life, and according to this decision of this court, his right to that office was beyond the control of the political power of the Government.

But we go one step further and maintain that, independent of the Act of 1866, the Act of August 5, 1882, if retrospective is unconstitutional, null and void.

As we have said, this is a case of contract. The Government may contract in the form of a Statute, and when it does so, it is as much bound by its contracts as an individual. But it is contended that Congress, like the British Parliament is sovereign and supreme, and not being restrained by the Constitution, may, at its sovereign pleasure, pass a law impairing the obligations of its own contracts. Can it?

This presents one of the most important questions which can engage our attention. "Is not Congress, as the legislative department of the Government in the exercise of its governmental powers, supreme?" This is but the echo of the old cry of despotism, "Can the King do any wrong?" which dogma, as has been said by this court, has no place in our system of Government. One of the most ominous signs of the times is the disposition in some quarters to distinguish between the Government and the people, so that the Government may be clothed with interests distinct from, and even incompatible with the interests of the indi-

vidual citizen. It is not unusual to hear this extenuation of some governmental outrage upon the rights of the private citizen, "The interests of the Government require the sacrifice of the citizen." Though this divine right of Kings was slain by our Constitution, and the rights of the citizen, which had been buried under the oppression of ages, was brought to life, yet it is still wrapped about with its grave clothes, and this august tribunal has the sacred duty to discharge of commanding, "loose him and let him go." Under forms of Government where the sovereign is the State, and the subject has only such rights as kingly prerogative may award him, there is room for distinguishing between the interests of the Government and the subject, but under our system, the boast of which is that it is a Government of the people, by the people, and for the people, where can there be found place for such distinction?

The Government is not the master, but the servant, not the principal, but the agent. Now, conceive of an agent saying to his principal, "I cannot manage your affairs in this or that way, because it is not consistent with my interest so to manage it." O! but it is suggested, the citizen's interests as an individual conflict with those of the body politic of which he is a member, and must therefore yield. But that exigency was provided for, by the charter that appointed the agent, in the comprehensive injunction embodied in this terse language, "private property shall not be taken for public uses without just compensation." What does that mean but this, all the individual citizens have made this agreement, to employ an agent for carrying on their common business and in the conduct of that business, it may happen that the rights and interests of one member of the compact shall be needed for the joint administration, and in such emergency, the individual con-

sents to part with those interests and rights for a just compensation.

The idea that this Government can repudiate its obligtion to a private citizen upon the ground that it would be onerous upon the Government to discharge it, is not less absurd than it is subversive of the very theory of the Government itself.

The question we are now considering is simply this, can Congress pass an Act which deprives a citizen of vested rights which he has acquired, under a prior Act, by performing all that the first Act required him to do, in other words, vested rights acquired by the payment of the stipulated consideration therefore?

We have said that this was a contract. This court has frequently held that the Government can contract by a legislative Act, and that such contracts are governed by the rules of ordinary contracts.

Was this a contract? Congress in the exercise of its highest powers, for the most important purposes, proposes by a Statute—the only way in which it could propose—that if those who are embraced in the Act will perform certain conditions on their part, that in consideration thereof the United States will perform certain other acts on its part. The Appellant accepted the offer of the Government. There was the "*aggregatio mentium.*" The Government obligated itself "*Facio ut Facias,*" a consideration as valuable as any known to the law. It is not material to inquire whether the consideration stipulated for by the Government and paid by the Appellant was adequate or not, for the inadequacy of a valuable consideration is no ground for the avoidance of the contract even in a Court of Equity.

Here then, we have a *contract,* upon valuable consideration fully paid by the Appellant. How is the Govern-

ment to escape from the performance of the contract on its part? By passing an Act repudiating its liability? It has been contended that inasmuch as there is no constitutional prohibition that Congress shall not pass a law impairing the obligation of contracts, that therefore Congress may pass such law.

But there was no necessity for prohibiting the United States from doing what they never had the power to do.

The powers of the General Government were granted powers. It had no other. The States were already sovereign, and as sovereigns retained all the powers not ceded to the General Government or denied to the States.

There was one express grant of the power to pass laws impairing the obligation of contracts, and this excludes the exercise of this power in any other case. The Constitution provides that Congress may pass a uniform Bankrupt law. This is the extent and the limit of Congress in such matters.

This court has approached the consideration of this question with great care. In the Chorpening case (94 U. S. 397), Mr. Justice Miller, speaking for the court said: "That the case presented the same legal aspect as if it were between individuals, and that the Act in that case did not impair vested rights, because the Act which it repealed gave no promise, and came under no obligation to Chorpening, and asked and received none from him, and that the reason of the right to pass the Act was, that there was no binding mutuality of assent, no consideration and hence no legal obligation resting on either party." In that case Chorpening claimed that under the first Act of Congress, he had acquired vested rights which had been impaired by the latter Act. This court held that his claim was bad, because the question of right and obligation were to be treated in the same way as if the controversy were between

that "the United States cannot any more than a State, interfere with private rights, except for *legitimate governmental purposes.*"

These governmental purposes are well defined by the law. They are three in number, the right of eminent domain, the right, duty, of protecting the life, health, safety and morals of the people, and the right of taxation. All of them may be comprehended as the law, higher even than the Constitution itself, *Salus populi suprema lex.*

If Congress were to pass an Act by which it bound the Government not to take the property of a citizen for public use, this would not prevent the exercise of the right of eminent domain for governmental purposes. It may be that if Congress by an Act was to obligate the Government never to tax the property of an individual, that a subsequent Act imposing taxes upon such property, if necessary in order to carry on the Government, would be valid. It is doubtless true that if Congress by a contractual Act, becomes obligated to an individual to permit him to carry on a business, if the conduct of that business becomes injurious, either to the safety, health or morals of the people, Congress could pass an Act repealing the former Act, but in all these cases, rights which the citizen had acquired under the contract or with which he was vested, at the time of the subsequent legislation, must be compensated for.

But does this concession aid the contention of the Appellees?

It may be, that if in the exercise of its general governmental powers, Congress were to abolish the Navy altogether, such act would be valid without compensation, if there was an implication in the contract, to the effect that if there was no Navy, there could be no officers of the Navy. That would be strictly governmental, and yet in

such case, the spirit of the Constitution would require that this governmental act, for the good of the whole body politic should not be oppressive to the individual citizen, in other words, that he should be compensated. But there is a Navy. There was no contract that the Appellant should always be kept in sea service. If there were no ships unofficered, of course he could not go to sea, but they could be kept waiting orders on shore.

And here we must not lose sight of the very evident distinction between a governmental act, and an administrative act. Whether there *shall be a Navy* or not may be governmental; how that Navy shall be managed is merely administrative. We might go further and concede that if there had been a *bona fide* and actual abolition of a certain grade in the Naval Service, and no other substituted in its place, that might release the Government from its obligation to appoint to that grade—but could not justify dismissal from the service.

But there was nothing of the kind. There has been a great deal of tinkering at this subject. The student was first a Midshipman, when appointed, an Ensign after he graduated. Then he was called a Cadet Midshipman while at the Academy, a Midshipman afterwards, and then an Ensign. Now the same appointee is called a Naval Cadet, until final graduation, and afterwards an Ensign, Engineer, or Officer of the Marine Corps. So that the administrative regulations have come back again to the original condition, until graduation, he is now a Naval Cadet, after graduation an Ensign, Engineer, or Officer of the Marine Corps. Formerly, he was a Midshipman, until final graduation, and afterwards an Ensign. All that has been done, is to do away with the preliminary condition of Cadet Midshipmen, in other words, the same appointee had two names, and two grades, while performing

exactly the same services, and now he performs the same services under one name, and in the one grade.

Is this such a radical governmental act, that it must interfere with individual rights? It is not the exercise of the right of eminent domain. It is not the exercise of the taxing power. It is not the exercise of police power, for the protection of the safety, health, or the morals of the people. The highest motive ever attributed to the author of it, was the sorbid motive of saving the Government a few thousand dollars per annum. There certainly is not much morality in that motive. This much may be said about it. If the Government may break its contract to save the morals of the people, it is not authorized to set the people an example of bad morals, by becoming itself immoral.

Once more. The spirit of the Constitution is a spirit of equality. Taxation must be equal. Representation must be equal. The duty of Military Service must be equal.

Here was a class of sixty young men. They had all entered the Navy under the same contract, and were to be kept there under the same conditions. The final condition, was that they should successfully pass their final examination. Not that the twenty, who passed the *best* examination, but all who passed the *required* examination.

By this Act, if retroactive and applicable to the Appellant, and his class-mates, there was to be a discrimination, while all were equal under the contract, a sort of class legislation. You are all equally entitled, says the Act, but we will select our favorites, and keep our contract with them, and break it with all the others.

Under which of its delegated powers, does Congress derive the right to do this execrable thing?

But let us descend to particulars. Rear Admirals are officers in the Naval Service. So are Midshipmen. Can

Congress dismiss a Rear Admiral from the service? Is there one law for an Admiral, and another for a Midshipman? Suppose that under the administration of the Navy Department, more Rear Admirals had been appointed than the needs of the service demanded, could Congress upon any consideration, select Admirals A. & B. for dismissal, and retain Admirals C. & D. in the service?

This brings the question to a crucial test.

Well, if not, where does Congress find its power to dismiss Midshipmen A. & B. from the service, and retain Midshipmen C. & D.?

Let the Government become a respecter of persons in this way, and at once there is a subversion of the Constitution.

This question is continually recurring and must be disposed of—"Is Congress an irresponsible sovereign power?"

It may be conceded that to the legislative branch of the Government has been entrusted all legislative powers, and that within that sphere they exercise judicial functions, that is to say, they are the judges of what is a proper legislative administration. But the very moment you clothe them with judicial functions, you must, in order to escape an arbitrary despotism, subject their *judicial* action to the principles of justice, even if there is no express constitutional restraint.

In the case of (Fletcher vs. Peck, 6 Cranch), this court settled that question.

Thus, early in the history of our Government, there were those who maintained, that the legislative department, within its sphere, was sovereign, except in so far as it was restrained by the express provisions of the Constitution.

They said, why not, it is like Parliament, and Parliament is sovereign, and therefore Congress must be. But the

Parliament was the Government; Congress is only a co-ordinate department of the Government, with powers only to do those things which the principles of the Constitution authorized it to do, comprehensively embraced in the power to provide for the common defense, and general welfare of the people. Our fathers did not throw off the despotic sovereignty of Parliament, to take on the despotic sovereignty of Congress—this would have been only a change of masters.

We know that it is asserted that from the very necessity of the case, Congress in the exercise of its functions must be the sole judge of the propriety, wisdom and justice of its acts. Well, grant this to be true, will it be contended that it is to be the sole judge of the fundamental question, to wit, whether the Act complained of, is the exercise of its proper legislative functions? Is it the exercise of its proper functions, to violate its contracts, to debauch the people, to confiscate the property of the citizen, or to do any act of injustice to any of the people? Would such an act be compatible with the general welfare of the people?

Congress might be of the opinion that it was, but does that make it so? Did the parent Government intend to sacrifice its children to such a Moloch as this?

Much has been said upon this question, both by the bar and from the bench, much that we could wish had never been said, but this court, through its great Chief Justice Marshall, fixed long ago the jurisdiction of the court upon such questions. In the case of (Fletcher vs. Peck), decided in 1801, he said: "If the legislature was not bound to submit its pretensions to those tribunals which were established for the security of property, and to decide upon human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice,

whose authority is universally acknowledged, that ought not to be entirely disregarded.

"If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its *power* alone, and the same power may divest any other individual of his lands if it shall be the will of the legislature so to exert it."

"The principle is this: That the legislature may by its own act, divest the vested estate of any man whatsoever for reasons, which by itself shall be deemed sufficient."

"Is the power of the legislature competent to the annihilation of such a title, and to a resumption of the property thus held?"

"The principle asserted is, that one legislature is competent to repeal any Act which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature."

"The correctness of this principle, so far as it respects general legislation, can never be controverted. *But if an act* be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power."

"When, then a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights, and the act of annulling them if legitimate, is rendered so by a power applicable to the case of every individual in the community."

"It may well be doubted, whether the nature of society and of Government, does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation?"

"To the legislature, all legislative power is granted, but the question whether the Act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection."

"It is the peculiar province of the legislature to prescribe *general rules for the government of society*, the application of *these rules to individuals in society*, would seem to be the duty of other departments."

Mr. Justice Johnson, said: "I do not hesitate to declare that a State does not possess the power of revoking its own grants. But, I do it on a general principle, on the reason and nature of things, a principle which will impose laws even on Deity."

This was the judgment of this court, rendered while the great actors in the formation of the Government were yet living.

Now, let us apply that decision to this case. The appointment of the Appellant was an act done under the law. The Act of August, 1882, passed by a succeeding legislature, could not undo the appointment. "*The past cannot be recalled by the most absolute power.*"

The Act under which the appointment was made, was in its nature a contract, and the Appellant acquired vested rights under that contract. "*The repeal of the law cannot divest those rights.*"

"The doctrine of Fletcher vs. Peck was reasserted by this court in the cases of Terrett vs. Taylor, 9 Cranch 43, and Wilkenson vs. Leland, 2 Peters 657."

It was contended in the court below, that if the Appellant was entitled to receive anything, it was only the pay of a Cadet Midshipman.

But he is claiming pay which accrued since his final graduation, and the statute is explicit, that a Midshipman

after his final graduation, shall receive such and such pay, according to the circumstances of being at sea, on shore, or on leave, or waiting orders.

Our contention is, that he is a Midshipman after final graduation, awaiting orders. The last valid order ever issued to him, was that of date, the 23d of June, 1883, in these words:

SIR: You are hereby detached from the Naval Academy; proceed home, and regard yourself waiting orders.

Respectfully,

J. E. WALKER,
Chief of Bureau.

Up to this date, he was certainly an officer in the Navy, was so considered by the Secretary of the Navy, and was not only subject to orders as such, but was *ordered* and *obeyed*.

We say, that he was a Midshipman after final graduation. This court has so decided. He was a Midshipman when first appointed, styled Cadet until final graduation, when by virtue of the law, he ceased to be a Cadet, and became a full Midshipman.

In the case of United States vs. Cook, (128 U. S., 254), the court speaking through Mr. Justice Bradley, said: "If the law designates a Cadet as a Midshipman the designation is an official one. The qualification of Cadet Midshipmen is used for the sake of distinction, to distinguish one kind of Midshipmen from another, a Midshipman at school from a Midshipman aboard a ship."

Lest some importance should be attached to the language of Section 1521 of the Revised Statutes, which declares that "when Cadet Midshipmen shall have passed successfully the

graduating examintions at the Academy *they shall receive appointments as Midshipmen*, and shall take rank according to their proficiency as shown by the order of their merit at date of graduation," as tending to show that something had to be done after final graduation, before they became Midshipmen, we remark that the meaning of this is that by some action, their rank as Midshipmen was to be fixed, in the order of their merit. They were all Midshipmen, but their rank in that grade was to be fixed by an appointment designating in some way, no matter how, the order in which they were to receive promotion to the next grade. Their graduation placed them all upon an equality. This appointment, whatever it was, was only for the purpose of fixing their rank respectively in the line of promotion.

But suppose this was not so, how would that effect the Appellant's right to a Midshipman's pay after final graduation?

Suppose an individual was to contract with an employee for a continuous service, to the effect that if he would satisfactorily serve in a certain capacity for six years, at such a salary, that he would then promote him to a better designated position at a higher salary. Now suppose the employee faithfully kept the contract on his part, and the employer should refuse to keep it on his part, would his failure to promote the employee release the employer from the obligation to pay the salary which he had contracted to pay?

Of course this argument is based upon the theory that the employer had no right to discharge the employee.

If there is the same law for governmental contracts and the contracts of individuals, as declared by this court in the Chorpening case, it is quite immaterial that the Appellant was not appointed to the rank to which he was entitled, according to his relative merit at the date of grad-

uation. All Midshipmen, whether the highest or lowest in order of merit were entitled to the same pay.

There is but one other point to be considered.

The great effort of the Appellees has been to confine the protection which the law affords to vested rights, to rights of property alone.

Even if this were so, this court has decided that the rights which an officer, not liable to be dismissed at the pleasure of the appointing power, has in his office, *is property*. This court has decided that a *contract* which the Government has made with a citizen, is *property*, so that if the contention of the Government on this point is sound, it does not help it in this case.

But is it sound in the sense in which it is asserted? Are the only rights which the Constitution of the land and the theory of our social compact protect, rights of property? Are not life and liberty, the pursuit of happiness, the rewards of patriotic service, the advantages of official position, the honor as well as the emoluments to which the citizen is entitled by virtue of his contract with the Government as sacred as money or bonds, lands or tenements? Can it be that the brightest and most valued jewel, for which the citizen has paid the highest price, is not as sacred in the eyes of the law, as that which is his to-day, anothers to-morrow and has been the slave of thousands?

Are the patriotic and ambitious youth of the land to be told, that while the Constitution and laws of the land protect vested property rights, that the rights which they have acquired by a patriotic consecration of their youth and early manhood to arduous labor, in order to fit themselves for higher service in the Navy of their country, and for the enjoyment of the honor and emoluments which

were the promised rewards of the faithful performance of their engagement with the Government, are so inconsiderable as to be beneath the care and protection of the law?

Are we to say to them, consecrate all your powers to the accumulation of wealth, to the prosecution of ordinary business, to the acquisition of anything but honor, in any service but the service of your country, from any motive other than patriotic ambition, for any end but efficiency in the service of your Government, and whatever rights you may acquire by such consecration or pursuits, the law will protect against unjust legislation, but those higher interests and more transcedent rights have no sanctuary even before the altar consecrated to justice, the very holy of holies in this temple of liberty?

Shall we say to them, if the Government shall contract to pay you money for labor, to grant you land for money or services, to relieve you from taxation in aid of trade, that no legislative action shall deprive you of the rights which you acquire under these contracts, but if you, from the highest motives which can influence human conduct, in implicit reliance upon the good faith of the Government have accepted an offer made by it, for the highest purposes for which a Government can become obligated, and have religiously kept faith on your part, and become entitled to the recompense which the Government bound itself to give you, Congress can at will deprive you of your reward, and resume the rights which had become yours under the law?

If it be the duty of the Government to protect the rights of the citizen, to encourage honesty, to foster honor and to set before the people an example which they may behold with admiration, revere with veneration and follow with

pride and reverence, then this outrage upon law and justice, the rights of the citizen, and the honor of the Government must be rebuked and redressed.

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RODOLPHE CLAUGHTON,
Counsel for Appellant.

Authorities relied upon, not cited in brief.

Retroactive Legislation.

Wood vs. The United States, 16 Peters, 342.
Arthur vs. Homer, 96 U. S., 137.
Memphis vs. United States, 97 U. S., 292.
Chew Hong vs. United States, 112 U. S., 536.

Vested Rights.

97 U. S., 292. 112 U. S. 536.

Vested Rights taken under the exercise of Police Power, must be compensated for.

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In the Supreme Court of the United States.

OCTOBER TERM, 1889.

JAMES D. CRENSHAW, APPELLANT,
vs.
THE UNITED STATES. } No. 1081.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

JAMES D. CRENSHAW, APPELLANT,
vs.
THE UNITED STATES. } No. 1081.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This suit is brought to recover $3,763.66, the amount of pay alleged to be due claimant as midshipman and as ensign in the United States Navy.

An ulterior, but by no means secondary, object of this suit is to test the validity of the discharge of the claimant from the service under the act of Congress of August 5, 1882 (22 Stat., p. 285). It is stated in the claimant's application to have this case advanced that—

> This is a test case, to try the question of the legality of the dismissal of forty-seven cadet-midshipmen from the Navy under the provisions of the act of Congress approved August 5, 1882.

STATEMENT OF THE CASE

The claimant was appointed a cadet-midshipman at the Naval Academy in September, 1877. (Finding 1, p. 2.)

He pursued the course of four years at the Academy and passed a successful examination at the end of it, and on June 10, 1881, received a certificate to that effect. (Finding 1, p. 2.)

On June 22, 1881, he was detached from the Naval Academy. (Finding 2, p. 2.)

On August 25, 1881, he was ordered to report for duty on the United States steamer *Pensacola.* (Finding 3, p. 3.)

On March 14, 1883, he was detached from the ship *Pensacola* and ordered to report to the Superintendent of the Naval Academy for examination. (Finding 4, p. 3.)

On June 15, 1883, he received from the Academic Board of the Academy a certificate of graduation, stating that he had been thoroughly examined and had been found proficient. (Finding 5, p. 3)

On June 23, 1883, he was detached from the

Naval Academy and ordered to "proceed home and regard yourself [himself] waiting orders." (Finding 6, p. 4.)

On June 26, 1883, he received the following order:

NAVY DEPARTMENT, *Washington, June* 26, 1883.

SIR: Having successfully completed your six years' course at the United States Naval Academy, and having been given a certificate of graduation by the academic board, but not being required to fill any vacancy in the naval service happening during the year preceding your graduation, you are hereby honorably discharged from the 30th of June, 1883, with one year's sea-pay, as prescribed by law for cadet-midshipmen, in accordance with the provisions of the act of Congress approved August 5, 1882.

Respectfully,

W. E. CHANDLER,
Secretary of the Navy.

Naval Cadet JAMES D. CRENSHAW, U. S. N.

(Finding 7, p. 4.)

This order was given on the theory that the claimant was subject to be dropped under the following provisions of the act of August 5, 1882 (22 Stat, 284):

For pay of the Navy, for the active list, namely: * * * Sixty-nine chief engineers, one hundred passed assistant engineers, thirty-five assistant engineers, seventy-three cadet-engineers (graduates); * * * one hundred and two cadet-engineers, one hundred and thirty cadet-midshipmen (not graduates); in all, four million forty-eight thousand three hundred dollars.

Provided, That hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each Congressional district and at large, as now provided by law for cadet-midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called "naval cadets."

And from those who successfully complete the six years' course, appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line, and Engineer Corps of the Navy and of the Marine Corps:

And provided further, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; and such appointments to be made from the graduates of the year, at the conclusion of their six years' course in the order of merit, as determined by the academic board of the Naval Academy; the assignment to the various corps to be made by the Secretary of the Navy, upon the recommendation of the academic board.

But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two. And if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year's pay, as now provided by law for cadet-midshipmen; and so much of section fifteen hundred and twenty-one of the Revised Statutes as is inconsistent herewith is hereby repealed.

* * * That the pay of naval cadets shall be that now allowed by law to cadet-midshipmen, and as much of the money hereby appropriated as may be necessary during the fiscal year ending June thirtieth, eighteen hundred and eighty-three, shall be expended for that purpose. * * *

That no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this act reducing the number of officers in the several staff corps: *Provided*, That no further appointments of cadet-engineers shall be made by the Secretary of the Navy under section three of the act of eighteen hundred and seventy-four.

Since the date of this order claimant has not been called on to do duty, and has received no pay except the amount by which his claim is credited. (Finding 8, p. 4.)

It furthermore appears that the certificate given at the end of the course at the Academy, in June, 1881, to cadet-midshipmen and cadet-engineers

was identical, with the exception that in the case of the former the certificate contained the words "preparatory to the two years' course afloat," and also that the claimant received one year's pay, which is credited on his claim. (Finding, 9, p. 4.)

The judgment of the court on this state of facts was "that the petition be dismissed." (P. 4.)

ARGUMENT.

WAS THE CLAIMANT SUBJECT TO THE ACT OF AUGUST 5, 1882?

After abolishing the law authorizing the appointment of cadet-midshipmen and cadet-engineers to the Naval Academy and directing that, in the place thereof, "naval cadets" shall be appointed from each Congressional district and at large, and that "*undergraduates* at the Naval Academy *shall hereafter* be designated and called "*naval cadets*," the act declares that—

> From those who successfully complete the six years' course appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line and Engineer Corps of the Navy and of the Marine Corps.

The act then provides that "appointments for each year shall be limited to the vacancies in the grades above mentioned occurring during the previous year, and shall be made from the graduates of the year, at the conclusion of their six years' course, in the order of merit as determined by the Academic Board of the Naval Academy;" but it also provides that in no event shall such appointments fall below ten "nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two." It then goes on to declare that should there be a surplus of graduates over and above those appointed, each of them shall receive "a certificate of graduation, an honorable discharge, and one year's pay, as now provided by law for cadet-midshipmen."

The claimant, being one of the surplus graduates, was discharged under the above provision.

It would seem clear enough that, if the claimant was an undergraduate when the act took effect, he fell within its provisions, for there is no pretense that he might have completed the six

years' course in 1882, he having entered the Naval Academy in 1877.

Whether then the act found him an undergraduate or not must be determined *by the law as it stood at the time the act was passed.* What then was the *status* of the claimant at the time the act of August 5, 1882, went into operation?

By section 1520, Revised Statutes, "*The* ACADEMIC COURSE *of cadet-midshipmen shall be six years.*"

This law, declaring that the *whole six-year course* of cadet-midshipmen shall be "ACADEMIC," seems conclusive on the question of *status;* for, as the claimant was appointed in September, 1877, it follows that he was still an academic in 1882, when the act was passed, and would continue to be such until the end of his "*academic course of six years*" in 1883; and as he was an *academic* in 1882, he was, necessarily, an *undergraduate* at that time. It would be nothing less than a solecism to speak of him as being both an *academic* and a *graduate at one and the same time.* But this would seem to be the result of any

argument to show that the claimant was not an under-graduate when the act of 1882 was passed.

Section 1521, Revised Statutes, provides as follows:

> When cadet-midshipmen shall have passed successfully *the graduating examination* at the Academy, they shall receive appointments as midshipmen and shall take rank according to their proficiency as shown by the order of their merit at date of graduation.

The graduating examination referred to in this section is necessarily the one which takes place at the end of the six years' academic course; and, consequently, after the claimant had passed, successfully, his "graduating examination" in 1883, he received from the academic board the certificate dated June 15, 1883 (Finding 5, p. 3), stating that the board, having found him proficient in his studies, "do hereby, in conformity with the law, grant to him THIS CERTIFICATE OF GRADUATION."

This final "graduating examination" and the examination for admission to the Naval Academy prescribed by section 1515, Revised Statutes, are the only examinations *required by law*, and all other examinations held at the academy are

merely the results of regulation by the Secretary of the Navy.

The Secretary of the Navy has, by virtue of his office as the immediate representative of the Executive in matters appertaining to the Navy, authority to make regulations for the Naval Academy consistent with law. Accordingly we find in existence quite a code of regulations, including regulations touching examinations and courses of study.

It is a part of the "academic course" to give cadet-midshipmen theoretical and practical instruction in seamanship, and hence Regulation No. 192 requires that "there shall be attached to the Academy suitable vessels equipped and kept in order for sea-service and gunnery practice."

But the experience thus afforded on practice-ships, as they are called, is not deemed sufficient, and hence cadet-midshipmen who pass successful examinations at the end of four years of the course are sent to sea on the regular men-of-war, where they remain until it is time for them to return to the Academy to stand "*the graduating examination.*"

Consequently, when the claimant had passed successfully the examination at the end of his fourth year, in 1881, he was furnished by the Academic Board with the certificate set out in Finding 1 (p. 2), stating that he "has completed the prescribed course of study at the United States Naval Academy, and has successfully passed the required examination before the Academic Board PREPARATORY TO THE TWO YEARS' COURSE AFLOAT."

To show how completely the academic character remains impressed on cadet-midshipmen while absent from the Academy, it is but necessary to look at Regulation 155, showing the subjects on which the final graduating examination is held. While these cadet-midshipmen are going through "the two-years' course afloat," they are necessarily preparing for "the graduating examination" at the Academy, to which they must return at the end of "the two-years' course afloat." They are temporarily and not permanently away from the Academy, and there is no more warrant for saying that they had severed their connection with the Academy when going through the course afloat than there would be for saying so when they

are absent at sea in the practice-ships or on leave. In all these cases they have the purpose and are under a duty to return to the Academy. If it were part of the course at West Point for cadets to spend two years in the Rocky Mountains and then return to the Military Academy to stand the graduating examination, would it not be very unreasonable to say that they had ceased to belong to the Academy during their two-years' absence?

It is in vain to appeal to executive orders in support of the claimant's theory in this respect, for, if any such orders favor that theory, which we deny, they can not be allowed effect without making the act of Congress give place to them, which is impossible.

It would thus appear that the claimant occupied the position of under-graduate at the time the act of August 5, 1882, went into effect.

It was upon a fundamental difference under the law, between cadet-engineers and cadet-midshipmen, that this court held in the cases of Redgrave and Perkins (*United States* v. *Redgrave* and *United States* v. *Perkins*, 116 U. S., pp. 474 and 483) that cadet-engineers who entered the

Academy in 1877 and had passed successfully their examinations at the end of four years, namely, in 1881, were *graduates* when the act of 1882 took effect, and so did not come within the act.

That distinction is pointed out and relied on by Mr. Justice Matthews in his opinion in Redgrave's case, and by the Court of Claims in other cases. (*Harmon* v. *U. S.*, 23 Ct. Cl., 132, and *Grambs* v. *same*, *ib.*, 420.)

It was found as matter of fact by the Court of Claims in Redgrave's case that—

> After completing the four years' course cadet engineers were *permanently detached from the Academy and were never required to return to that* institution. They remained in active service at sea two or three years or longer, until vacancies occurred in the grade of assistant engineer, when they were ordered, singly or in groups, for examination for promotion, under the provisions of section 1392 of the Revised Statutes, before a board of engineer officers, which held its sessions *at Philadelphia* (*ubi supra*, p. 475).

The court further found, in that case, that cadet-midshipmen, after the four years' course, "*were temporarily detached*," and that at the end of the two years' course afloat "they were required to return, and did return to the Naval Academy, where they were subjected to a '*final graduating examination*'" (*ibidem*).

The court say in Redgrave's case that—

> It is found as a fact by the Court of Claims that, before the passage of the act [of August 5, 1882], cadet-engineers who had successfully passed their examination at the end of the four years' course of study at the Academy *were called and considered graduates.*

The court then calls attention to several acts of Congress in which this classification of cadet-engineers *as graduates* after passing successfully the examination at the end of the four years' course at the Academy is distinctly recognized, as, for instance, section 1556, Revised Statutes, which fixes the pay of cadet-engineers at so much before "*final academic* examination," and so much "after *final academic* examination, and until warranted as assistant engineers," thus evidently treating the final *academic* examination at the end of four years as the graduating examination.

Now this distinction seems fully warranted by the material difference between the language in which Congress defines the courses of cadet-engineers and cadet-midshipmen. In the case of cadet-midshipmen, as we have seen, Congress says (§ 1520, R. S.) "the *academic* course of cadet-midshipmen *shall be six years;*" but in the case of cadet-engineers, Congress declares, in

section 1524, R. S., as amended by the act of February 24, 1874 (18 Stat., 191; Supp. Rev. Stat., 83), that "*the course* for cadet-engineers shall be six years, *including two years of service on naval steamers.*"

It is certainly very significant that Congress should have dropped the word *academic*, used as a qualification of "course" in section 1520, and that it should have spoken in section 1524 of the last two years of the "course" of cadet-engineers as "*years of service*," whereas in section 1520 the whole six years' course of cadet-midshipmen is denominated "*academic.*"

There would seem to be no doubt about this distinction between the two courses, for Mr. Justice Matthews, in Redgraves' case (*ubi supra*, p. 479), says that "the students at the Naval Academy styled cadet-midshipmen were required to take an academic course of six years," and then he quotes the pregnant language of the act of March 3, 1877 (19 Stat., 390), where it is said that cadet-midshipmen "during such period of their course of instruction *as they shall be at sea* in other than practice ships, are entitled to

receive, as annual pay, nine hundred and fifty dollars."

He speaks of the purpose of the act of August 5, 1882, "to abolish the distinctions *previously made by law between cadet-engineers and cadet-midshipmen*, and for the future to merge both classes in the new designation of naval-cadets." The learned justice then uses this very important language:

> The previous differences between them [*i. e.*, between cadet-engineers and cadet-midshipmen] grew out of separate provisions as to their number, their manner of appointment, THEIR COURSE AND TERM OF STUDY, and their pay after their four years' course at the Academy (*ubi supra*, p. 481).

That the act of 1882 was intended to take effect at once as to all "undergraduates" at the Academy is plain. It declares that "all the undergraduates at the Naval Academy shall hereafter be designated and called naval cadets," and it was manifestly not the intention of Congress that the old undergraduates should be called cadet-midshipmen and cadet-engineers, respectively, and the new appointees "naval cadets." This alone seems enough to settle that question, else an act passed to abolish distinctions among undergraduates would be made to produce the

opposite of what was intended, by establishing, temporarily, three classes of under-graduates in the place of the two under the former law.

Again, the exception from the act of the class completing its six years' course in 1882 establishes the construction contended for. The language of the exception is as follows:

> But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two.

The statute was, it would seem, draughted before the close of the six years' course in June, 1882; otherwise there is no sense in the exception, as the six years' course referred to had been completed when the act was passed, in August, 1882, and those who were to be benefited by the exception did not stand in need of it, being graduates already. Supposing, now, as we must, that the act was draughted before the close of the academic year, in 1882, the exception is inconsistent with the interpretation contended for by the appellant.

It seems, therefore, demonstrated that the claimant was subject to the act of 1882.

THE VALIDITY OF THE ACT OF AUGUST 5, 1882.

The validity of the act of 1882 is earnestly assailed on the ground that when the claimant entered the Naval Academy a contract arose between him and the United States, which, in consideration of his services, entitled him to retain a position in the Navy during good behavior, and that the act of 1882, under which the claimant was discharged, as we say, from the service, is destructive of that contract and null and void.

It is undoubtedly true that when one individual enters into a contract with another he thereby parts with so much of his freedom as relates to the subject-matter covered by the contract, and to that extent becomes subject to the other contracting party. And it may be conceded, without any danger to the argument for the appellee, that when any agency of the Government of the United States enters into a contract, which it has the power to make, that the United States in like manner becomes subject to the other contracting party, and lays down its sovereignty at his feet to the extent of the matter of the contract.

Now it is deliberately claimed by the appellant that Congress had the power and the purpose to become subject to him and to lay down the sovereignty of the United States at his feet by a contract to keep him in his position as a part of the organization for the "common defense."

Is not the bare statement of such a proposition an argument of itself to show that no contract was intended, or, if any was intended, that it was beyond the competency of Congress?

The duty of providing for the common defense by maintaining an Army and Navy in a state of efficiency, is one of the most important legislative duties imposed by the Constitution.

After all that has been laid down on the subject of legislative power, it sounds strange to hear a claim set up to a vested right to remain an officer of the Navy in spite of legislation to relieve the country of the burden of too many officers in that branch of the public service.

From the very nature of the relation of an officer of the Navy or the Army to the Government, he has notice, when he assumes that relation, that his tenure of office and the regulation of his pay

and emoluments are subject to the legislative power of Congress, just as in the case of a public grant which, from its character, is notice to the grantee that he takes subject to the grantor's power to tax.

This court said in Stone vs. Mississippi (101 U. S. 814, 820) that the agencies of government "can not give away nor sell the discretion of those that are to come after them, *in respect to matters the government of which, from the very nature things, must 'vary with varying circumstances.'*" Judge Cooley says, "It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State can not barter away, *or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society;* and that any contracts to that end are *void* upon general principles, and can not be saved from invalidity by the provision of the national Constitution now under consideration." (Const. Lim. [283].—"The contracts which the Constitution protects," said this court, in Stone vs. Mississippi,

"are those that relate to property rights, *not governmental.*" And Mr. Greenleaf classes among the powers of government "which are essential attributes of sovereignty, *indispensable to be always preserved in full vigor,*" the power "*to provide for the common defense.*" (Cited, Cooley Cons. Lim. [282] note 2.)

If it were not so, how is it that Congress has the power to put all officers on the retired list at reduced pay who have reached a certain age, entirely regardless of the fact that an officer, in a given case, may be sound in mind and body, or to say that there shall be no new promotions (15 Stat., 318), or that officers may be put on the list of supernumeraries and eventually honorably discharged from the service? (16 Stat., 318.)

It is but to look at the legislation of the United States relating to the Army and Navy to be satisfied that what is here claimed by the appellant is at war with a power over the Army and Navy which Congress has been exercising from the beginning of the Government down—a power which is extremely beneficial, and which

Congress could not lose without serious detriment to the public interests. The claimant has not been singled out for dismissal, but he was dropped because not selected by the Executive for one of a limited number of vacancies existing in the service at the time he was graduated. All who were graduated could not receive appointments, and of course some had to be dropped. Not, however, by Congress, but by the Executive by authority of Congress. In no other way could Congress retain its control over the subject of the numerical strength of the Navy.

But if there was a contract with the claimant it can not be successfully maintained that section 1229 of the Revised Statutes, or article 36 for the government of the Navy, declaring that no officer of the Army or Navy shall in time of peace be dismissed except by the sentence of a court-martial or in commutation of such sentence, entered into that contract, for those provisions of law are plainly a limitation of the executive power of removal, established by Congress under its power "to make rules for the government and regula-

tion of the land and naval forces." They were not intended to be in any sense a limitation of the power of Congress over the Army and Navy. If, then, Congress has attempted to surrender its power in the premises, the provisions in question are clearly no evidence of the fact, as is mistakenly supposed in the brief for the appellant.

Again, it is said that Congress has attempted to usurp the appointing power by making "naval cadets" out of cadet-midshipmen and cadet-engineers. This is a somewhat strange position for the appellant to take, for his claim is that a part of the sum sued for is due him as an *ensign*, a rank which he could only hold by virtue of the acts of Congress of March 3, 1883 (22 Stat., 472) and June 26, 1884 (23 Stat., 60), *making cadet-midshipmen ensigns.*

But Congress has only exercised, in this respect, a long-conceded power, such as it used when it declared that captains should be denominated flag officers (11 Stat., 154), and "masters commandant" "commanders," and "sailing masters" "masters" (5 Stat., 163). What was done in this case was merely to make a change of name, and

in no sense to create a new office and make appointments to fill it.

But as was held by the Court of Claims, in Gramb's case (*supra*), the claimant can not possibly have a *status* in the Navy. After his graduation he *ceased to be a naval cadet* or, if you please, a cadet-midshipman, *and he has received no appointment as midshipman under section* 1521 *Revised Statutes.* Can the judicial department of the Government appoint him a midshipman? Under the law, as the Court of Claims hold, in the case just cited, a cadet-engineer continues in the service as such, until promotion, *but not so with the cadet-midshipman.* He does not remain in the Navy as a *tertium quid.*

It would seem, then, to result, that the judgment dismissing the petition must be affirmed.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

JAMES D. CRENSHAW, appellant,
vs.
THE UNITED STATES, appellee.

No. ~~1400.~~ 1081

In the Supreme Court of the United States.

JAMES D. CRENSHAW, appellant,
vs.
THE UNITED STATES, appellee.
No. 1490.

Petition of the appellant to have the cause advanced for hearing.

The appellant, James D. Crenshaw prays the Court to advance this cause on the calendar for hearing, and submits the following reasons in support of the petition.

1st. This is a test case to try the question of the legality of the dismissal of forty seven cadet-midshipmen, from the Navy, under the provisions of the Act of Congress, approved August 5th, 1882.

2d. It is of the greatest importance to the appellant and his brother officers, that this question should be settled by this Court at the earliest possible moment, as their pursuits and interests for life depend upon the decision.

3rd. It is of the greatest importance to the public interest in the administration of the Navy Department, that the question should be settled, because if the judgment of the Court should be adverse to the appellee, the rearranging of the Naval Register in order to give the appellant and his brother officers their proper places in the Navy will be very perplexing, and becomes more so every day, as new promotions and appointments are being constantly made.

4th. The questions involved are of the greatest national importance, and of momentous public interest, and are in part the following:

(*a*) Has Congress the power to dismiss, or authorize the dismissal of an officer from the Naval service?

(*b*) When Congress by one Act has authorized the President to appoint an officer in the Naval service, whose tenure is during good behaviour, and the President has made the appointment, has Congress the power by another Act, to revoke the appointment, or in any way to qualify or modify it?

(*c*) When the President in the exercise of his executive power has appointed an officer, whose tenure is during good behaviour, to fill an office created by Congress, and an appointee has accepted the appointment, and is in the faithful discharge of his official duties, has Congress the power, to change either the character of the office, or the designation of the officer?

(*d*) If Congress has no power to appoint an officer, has it the power to limit, or qualify the official rights with which the appointment has invested him?

This does not involve the question of the right of Congress to abolish the office, or to change the compensation.

JAMES D. CRENSHAW,
By his Attorney.

H. O. Claughton